

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Advocate Communications, Inc., d/b/a/ Advanced)	
Cable Communications)	CSR-6548-E
)	
Petition for Determination of Effective Competition)	
in Weston, Florida)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 2007

Released: March 8, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers a petition filed with the Commission by Advocate Communications, Inc. d/b/a Advanced Cable Communications, Inc (“Advanced”) pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission’s rules for a determination that Advanced’s cable system serving Weston, Florida is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”) and is therefore exempt from cable rate regulation.¹ The City of Weston (“Weston”) opposed the petition and Advanced filed a reply. We deny the petition.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,² as the term is defined by Section 623(l) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission’s rules.³ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁴

II. DISCUSSION

3. Section 623 (l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the cable operator demonstrates that its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to the programming services offered by the MVPDs, other than the

¹ 47 C.F.R. §§ 76.7, 76.905(b)(1) & (2), 76.907; 47 U.S.C. § 543(a)(1).

² 47 C.F.R. § 76.906.

³ See 47 U.S.C. § 543 (l); 47 C.F.R. § 76.905.

⁴ See 47 C.F.R. §§ 76.906 & 907.

largest MVPD, exceeds fifteen percent of the households in the franchise area.⁵

4. With respect to the first prong of the competing provider test, Weston's Opposition offers the following explanation which is not contradicted by Advanced. When the area now comprising Weston was first developed, the developer entered into exclusive bulk contracts of potentially indefinite length with Advanced for cable services.⁶ The contracts provide that residents must pay for cable service as part of their homeowner association agreement or risk liens or foreclosure on their homes.⁷ The record indicates that most of the city's residents, over 15,000 households (approximately 68 percent of Weston households), must pay to receive cable service provided by Advanced.⁸ Advanced's exclusive bulk contract subscribers are arguably free to also subscribe to a DBS provider but must do so in addition to the service they are contractually required to take from Advanced by their homeowner's association agreement. In addition, according to Weston, because of these exclusive contracts, Comcast serves only a small portion of the city and has determined not to construct its system in areas served by Advanced.⁹ In order for the Commission to find competing provider effective competition, we must conclude that the franchise area is served by at least two unaffiliated MVPDs "each of which *offers* comparable video programming to at least 50 percent of the households in the franchise area."¹⁰ MVPD service is offered, *inter alia*, "[w]hen no regulatory, technical or other impediments to households taking service exist. . . ."¹¹ While we are concerned that the mandatory nature of Advanced's exclusive bulk subscriber contracts affecting 68 percent of the households in Weston may serve as a significant impediment to those Weston residents taking service from competing MVPDs, we do not herein make a finding on the first prong of the competing provider test because we find that Advanced has failed to demonstrate that it meets the second prong of the test, namely that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.

5. In support of its assertion that it meets the second prong of the test, Advanced presents a report from Sky Trends showing the number of DBS subscribers within four zip codes attributed to Weston.¹² This report indicates that there are 5992 DBS subscribers out of a total of 29,316 households in the zip codes listed resulting in a penetration rate of approximately 20 percent.¹³ Weston challenges this methodology, stating that the four zip codes identified by Advanced overlap other franchise areas and no allocation formula was used to discount subscriber numbers to account for this overlap.¹⁴ In reply, Advanced concedes that its original total household figures were inflated but proposes to discount these

⁵ 47 U.S.C. § 543 (l)(1)(B); *see also* 47 C.F.R. § 76.905 (b)(2).

⁶ Weston Opposition at 3.

⁷ *Id.*

⁸ Weston Opposition at 6.

⁹ Advanced in its Reply concedes that Comcast does not serve 50 percent of the franchise area and thus cannot be considered under the first prong of the test. *See* 76.905(b)(2)(1). Reply at n. 8. By separate order, the Bureau has determined that Comcast has made an affirmative decision to serve less than the entire franchise area of the City of Weston. *See Comcast of Greater Florida/Georgia, Inc.*, DA 07-1083 at ¶6 (rel. March 7, 2007) ("*Comcast*").

¹⁰ 47 U.S.C. § 543(l)(1)(B) (emphasis added).

¹¹ 47 C.F.R. § 76.905(e)(2).

¹² Advanced Petition at 6.

¹³ Advanced Petition at Exhibit 7.

¹⁴ Weston Opposition at 13-14.

numbers by a factor of 20 percent which it derived from deposition testimony of Weston's mayor given in a civil court case involving Advanced's contract with the city.¹⁵ This unsubstantiated testimony is not germane to determining an appropriate allocation figure for DBS subscribers in zip codes that overlap other franchise areas.¹⁶

6. We find that Advanced has not submitted sufficient evidence to demonstrate a DBS penetration rate exceeding 15 percent and thus fails to meet the second prong of the competing provider test.¹⁷ Accordingly, we deny its petition. Our denial is without prejudice to refiling should Advanced choose to properly allocate DBS subscribership in accordance with Commission precedent, or if the competitive circumstances in Weston change sufficiently to justify a finding of effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition filed by Advanced Communications for a determination of effective competition in Weston, Florida **IS DENIED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

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¹⁵ Advanced Reply at 9; Exhibit 3. The mayor's testimony reflects his unsubstantiated opinion that perhaps 80% of the city's households would continue to subscribe to Advanced if the exclusive contracts were terminated.

¹⁶ Advanced also argues that Comcast provides service to more than 15 percent of the households in the franchise area. As discussed above, however, because we conclude that Comcast has affirmatively redefined its Weston franchise area, it is inappropriate to use Comcast's competitive penetration to demonstrate competing provider effective competition in Advanced's significantly larger Weston franchise area. *See Comcast* at ¶ 6.

¹⁷ *See Time Warner-Advance/Newhouse Partnership, d/b/a Time Warner*, 20 FCC Rcd 5225, 5227 (MB 2005).

¹⁸ 47 C.F.R. § 0.283.